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No. 85-694

In the Supreme Court of the United States

October Term, 1985

DOUGLAS A. DOWTY,
Petitioner,

vs.

PIONEER RURAL ELECTRIC COOPERATIVE, INC.,
UTILITY WORKERS UNION OF AMERICA,
Respondents.

BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit

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QUESTION PRESENTED FOR REVIEW

Does the Statute of Limitations in a hybrid §301/unfair representation action begin to run when the claimant knew or should have known of the union's alleged breach of its duty of fair representation?

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STATEMENT OF THE CASE

Respondent, pursuant to Supreme Court Rule 34.2, will only supplement Petitioner's Statement of the Case in order to correct a material omission.

While Petitioner briefly sets forth the events that occurred at the July 7, 1981 meeting, Petitioner fails to include the fact that Petitioner learned of the actual contents of the arbitration panel's award on July 7, 1981, when he met with union officials. He knew at that time, despite whatever the union officials told him, that the award upheld the company's right to prohibit his "moonlighting" activities and gave him ten days to discontinue

such activities. He also knew, at that time, what the union had done in pursuing his grievance to arbitration and that the union was no longer going to contest the award that adversely affected him.

There can be no doubt that as of July 7, 1981, Petitioner had all facts upon which to file suit yet waited until the statute of limitations expired, albeit by one day.

SUMMARY OF ARGUMENT

Petitioner has failed to establish, by the criteria set forth in Supreme Court Rule 17, any basis for this Court's grant of certiorari. There is no significant conflict between the United States Courts of Appeals as to when the statute of limitations in a hybrid §301/unfair representation claim accrues. The rule that the statute accrues when the claimant knew or should have known of the union's alleged breach of its duty of fair representation was properly applied herein.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

In this case, the Sixth Circuit Court of Appeals held that the statute of limitations for this hybrid §301/unfair representation case began to run "when the claimant knows or should have known of the union's alleged breach of its duty of fair representation." *Dowty v. Pioneer Rural Electric Coop., Inc.*, No. 83-3621 slip op. at 7 (6th Cir. 9/9/85) (Petitioner's Appendix A8). Petitioner appears to base his Petition for a Writ of Certiorari on an alleged conflict between the Courts of Appeals as to this accrual rule, when, in fact, no such conflict exists.

Given the unprecedented volume of Supreme Court Petitions for Writs of Certiorari, it is incumbent upon the Petitioner to meet one or more of the following criteria before the Court's discretionary review is invoked:

1. There must be existence of a true and significant conflict between the Federal Circuit Courts of Appeals;
2. A lower court has decided an important question of federal law that should be settled by the Supreme Court; or
3. The Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for the exercise of this Court's power of supervision."

Supreme Court Rule 17. Petitioner appears to assert that the first criteria, a conflict between the Federal Circuit Courts of Appeals is the basis for his request for discretionary review.

However, a review of the circuits establishes that the accrual test used by the Sixth Circuit is commonly applied by all the circuits and there exists no conflict, especially no significant conflict. *See C. L. Craft v. Automotive, Petroleum and Allied Industries Employees Union, Local 618*, 784 F.2d 800 (8th Cir. 1985); *Howard v. Lockheed-Georgia Co.*, 742 F.2d 612 (11th Cir. 1984); *Santos v. District Council of New York City*, 619 F.2d 963 (2nd Cir. 1980); *Scott v. Local 863, I.B.T.*, 725 F.2d 226 (6th Cir. 1984); *Russel-Newman Mfg. Co.*, 167 N.L.R.B. No. 156 (1968), *enf'd*, 406 F.2d 1280 (5th Cir. 1969); *NLRB v. Shawnee Industries, Inc.*, 333 F.2d 221 (10th Cir. 1964);

Metz-Tootsie Roll Ind., Inc., 715 F.2d 299 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 976 (1984).

A review of these cases establishes that the universal rule for the accrual of statute of limitations is when petitioner knew or should have known that he was injured, i.e. knew or should have known of the union's alleged breach of its duty of fair representation. *Id.* A close examination of Petitioner's brief reveals that the relief Petitioner is actually praying for is a new accrual rule that would start the statutes of limitations upon receipt of the written arbitration award. Not only was this position rejected herein but was also rejected by the Eighth Circuit Court of Appeals in *C. L. Craft v. Automotive, Petroleum and Allied Industries Employees Union, Local 618, supra,* wherein the Court held that receipt of the written notice was irrelevant. Accrual in *C. L. Craft* occurred when the Plaintiff's grievance was finally rejected and he knew that his final contractual remedy, urging the union to strike, was denied. *Id. See also, Brown v. Duff Truck Lines, Inc.*, 557 F. Supp. 194, 196 (S.D. Ohio 1983).

In this case there existed no genuine issue of fact regarding Plaintiff's knowledge of the decision of the arbitrators. On July 7, 1981 he met with the union officials and learned of the actual contents of the arbitration panel's award, which included the fact that he had to discontinue "moonlighting" within 10 days as a condition of his reinstatement. He knew as of July 7, 1981 that the union would not contest this award. In spite of having all requisite knowledge by July 7, 1981 Petitioner waited until January 8, 1982 to file suit, which was one day after the statute of limitations. While the result herein may be harsh, as the district court observed, "the law must draw lines somewhere, and the interests served by the

use of the NLRA §10(b) as a limitations period in hybrid §301 cases (i.e. the need for uniformity and the rapid resolution of labor disputes, *see Del Costello*, 103 S. Ct. at 2292-94) would be thwarted if unjustified exceptions were made to the six months period." (Petitioner's Appendix at A17).

CONCLUSION

Petitioner has failed to prove that this case merits the discretionary Writ of Certiorari. He has failed to establish, pursuant to Supreme Court Rule 17, that there exists a true and significant conflict between the circuits regarding the accrual of the statute of limitations in hybrid §301/unfair representation actions. The Federal Circuit Courts of Appeals are in accord with their rulings that focus upon what the Plaintiff knew or should have known and the Courts that have considered requiring written notice have rejected that test.

Respondent prays that Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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